civil suits are complex and important issues which require the services of a person with special qualifications and experience. I think this is a proper case to admit Mr. Munro to appear in the two civil suits.

I order that the applicant be admitted to practise as an advocate and solicitor of the High Court in Malaya for purposes of a leading counsel for Lorrain and the application before the Supreme Court at Kuala Lumpur and in Civil Suit Nos. C138 and C438 of 1985 and in any interlocutory proceedings in respect thereof.

Order accordingly.

Solicitors: *Fernandez & Co.; Skrine & Co.*

VILLAGE HOLDINGS SDN. BHD. v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA

[O.C.J. (Shankar J.) January 7, 1987]

[Kuala Lumpur – Civil Suit No. C23-2838-86]

Civil Procedure – Writ issued against Queen in Right of Canada – Writ left with member of State of Canadian High Commission – Objection to service – Conditional appearance – Application to set aside writ and purported service thereof.

Diplomatic Immunity – Foreign sovereign, immunity of – Diplomatic and Consular Privileges Ordinance 1957, ss. 3 & 6 – Diplomatic Privileges (Vienna Convention) Act 1966 – Vienna Convention, Art. 31 – "Private" property – Civil Law Act 1956, s. 3.

International Law – Sovereign immunity – Foreign sovereign – Ownership of land in Malaysia.

Constitutional Law – Sovereign immunity – Federal Constitution, Arts. 32(1) & 181(2).

In this case, the plaintiff had entered into an agreement to purchase premises used as the residential accommodation of the diplomatic members of the Canadian High Commission. Her Majesty the Queen in Right of Canada, being the registered proprietor of the land, was named as vendor and the plaintiff as the purchaser. The agreement provided that in the event of non-completion by reason of the plaintiff's default, the defendant was entitled to forfeit the deposit and without prejudice to other remedies. Time was to be of the essence of the agreement. The plaintiff did not complete as provided in the agreement or at all. Extensions of time were requested and given but for a price. The defendant's solicitors eventually notified the plaintiff's solicitors that the agreement had been terminated and that all sums paid by the plaintiff under the agreement stood forfeited to the defendant. This amounted to $1,752,835.35. The plaintiff took out a writ against the defendant claiming, *inter alia*, (1) that the notice of termination of the agreement was in fact a wrongful repudiation of the agreement and (2) that the forfeiture of the total amount by the defendant under the said agreement was improper. An attempt to secure the writ at the Canadian High Commission was resisted but the writ was eventually left with a Malay female member of the staff of the High Commission. The High Commission protested immediately. The defendant filed conditional appearance and then applied for the writ and the purported service thereof to be set aside.

Held: the defendant is not subject to the jurisdiction of the court and the writ must be set aside.

Per Shankar J: (1) For myself, I do not consider the leaving of a writ with some unidentified member of an embassy staff is proper service (even if we are to assume that the person concerned was so employed) and that the entry into the premises was lawful. Nor have I been satisfied that the premises of the Canadian High Commission is outside the jurisdiction of this court. The expression jurisdiction here, to my mind, must mean the area of the territorial jurisdiction of the High Court.

(2) But the law is that substituted service can only be had in cases in which personal service could be had. As the courts have no jurisdiction over a foreign sovereign, the rule is that he cannot be served by substitution (*Mighell* v. *Sultan of Johore*[1]). See also in the case of a colonial government (*Sloman* v. *Government of New Zealand*[2]). Where there is sovereign immunity, service can only be effected if the sovereign ruler or government submits to the jurisdiction of this court. In the present case, there never was any submission. The purported service was not only factually ineffective but also in violation of a statute. On that ground alone, I am compelled to hold that there was no proper service as required by law or at all.

(4) Even if there was some prior contractual agreement to submit, such agreement is not permanently binding and the sovereign can subsequently refuse to be impleaded.

(5) The Diplomatic Privileges (Vienna Convention) Act 1966 ("the 1966 Act") has not diluted the immunity claimed by the defendant in the manner claimed by plaintiff's counsel or at all. To my mind, there is an important distinction to be drawn between the immunity accorded to a sovereign, and that accorded to a sovereign's diplomats. Under Part II of the Diplomatic and Consular Privileges Ordinance No. 53 of 1957 ("the 1957 Ordinance"), section 3 conferred total immunity from suit and legal process to the chief representative (in this case the Canadian High Commissioner) and the members of his official staff.

(6) It is the opinion of this court that this Article (Article 31 of the Schedule to the 1966 Act) does not assist the plaintiff for two reasons. First, the exception only applies to *private* immovable property. I hold this to mean that the property must be owned by some individual or corporation. Here, the property was owned by Her Majesty the Queen herself. Part V of the 1957 Ordinance is still good law and section 9 thereof expressly authorizes the ownership by a foreign sovereign of land in Malaysia for the purposes of the residence or offices of the chief representative of such country or his official staff. It is therefore not "private" property in the sense intended in Article 31.

(7) I hold that in the case before me, by virtue of section 9 of the 1957 Ordinance, where land in Malaysia is granted, alienated, leased or transferred to or owned or held by the sovereign or government of any country even if only as a residence of its official staff, it must be held that such land is held for the purposes of the mission.

(8) The foundation of the doctrine of sovereign immunity in international law is reciprocity and mutual recognition.

(9) In Malaysia, we have enshrined the paramount position of our rulers in the matter of sovereignty in the second principle of the Rukun Negara and the last bar of our national anthem. This court should take occasion to reaffirm that we regard the sovereignty and legal immunity of our rulers in their personal capacity as non-justiciable. As to how the limits of the doctrine of sovereign immunity should be defined, it is not irrelevant to state that within Malaysia, Articles 32(1) and 181(2) of the Constitution (which provides for the legal immunity of the Yang di-Pertuan Agong and the rulers of the states respectively) have received judicial attention in *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg and Tawi Sli (No. 2)*(7) and *Haji Ariffin* v. *Government of Pahang*.(8)

(9) So far as a foreign sovereign is concerned, I hold that section 3 of our Civil Law Act 1956 leaves no room for any doubt that we in Malaysia continue to adhere to a pure absolute doctrine of state immunity when it comes to the question of impleading a foreign sovereign who declines to submit.

(10) I feel constrained to say that since the plaintiff knew that the defendant would refuse to submit to the jurisdiction if it was sued, this suit was an act of *lese-majeste* and clearly misconceived. The manner in which the plaintiff's solicitors went about trying to get it served was an abuse of the process of this court and an affront to the defendant.

Cases referred to:

(1) *Mighell* v. *Sultan of Johore* [1894] 1 Q.B. 149.
(2) *Sloman* v. *Government of New Zealand* (1875) 1 C.P.D. 567.
(3) *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria* [1977] 1 All E.R. 881.
(4) *Intpro Properties (UK) Ltd.* v. *Sauvel & Ors.* [1983] 2 All E.R. 495.
(5) *I Congreso* [1983] 1 A.C. 244.
(6) *Duff Development Company Limited* v. *Kelantan Government & Anor.* [1924] A.C. 797.
(7) *The Parlement Belge* [1874-80] All E.R. Rep. 104.
(8) *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg & Tawi Sli (No. 2)* [1967] 1 M.L.J. 46.
(9) *Haji Ariffin* v. *Government of Pahang* [1969] 1 M.L.J. 6.

CIVIL SUIT.

S. Thillaimuthu for the plaintiff.

P. Koo (*S.N. Wong* with him) for the defendant.

Cur. Adv Vult.

Shankar J.: After filing a conditional appearance, Her majesty the Queen in Right of Canada has applied to this court for the writ in this action and the purported service thereof be set aside. It is contended that by virtue of Her Majesty's sovereign immunity this court has no jurisdiction over the defendant. As to the purported service, it is contended that there has been a non-compliance with Order 6 rule 6 and Order 11 of the Rules of the High Court 1980, and also a violation of section 6 of the Diplomatic and Consular Privileges Ordinance 1957.

Immediately after hearing submissions from the respective counsel, I held that the defendant is not subject to this court's jurisdiction and set aside the writ. In view of the gravity of the matter, I said I would deliver a written judgment in due course. I do so now.

The facts

Village Holdings Sdn. Bhd. (the plaintiff) has its registered office at 2nd Floor, George Town Chambers, 39 Beach Street, Penang. That is also the address of Jayaraman Ong & Co. As the plaintiff's solicitors, they wrote to Messrs. Jones Lang Wootton, a firm of property consultants, on August 17, 1983 and offered, subject to contract, to buy the land comprised in Grant 19454 Lot 270 Section 63 City of Kuala Lumpur (the said land) at $180 per square foot. The offer was conveyed to the Canadian High Commission, who had the administrative charge of the matter.

The said land is known as No. 9, Jalan Stonor, Kuala Lumpur. It was used as residential accommodation for the diplomatic members of the Canadian High Commission in Kuala Lumpur. Jones Lang Wootton came back to the plaintiff's solicitors on November 8, 1983 with tentative terms, also subject to contract. The final draft sale and purchase agreement was to be subject to perusal and approval by the treasury board and the Privy Council of the Canadian Government.

Eventually, a formal written sale and purchase agreement (the said agreement) was executed on May 11, 1984. The plaintiff company was the named purchaser. Her Majesty the Queen in Right of Canada, being the registered proprietor of the said land, was named as the vendor. The consideration was 5,737,410 *i.e.* $176.40 per sq. ft. The said agreement recites that 10% of the purchase price had been received on execution. Completion was to take place within four months of the said agreement (*i.e.* September 11, 1984) or within two

weeks of the receipt of the approval of the foreign investment committee, whichever was the earlier. In the event of non-completion by reason of the plaintiff's default, the defendant was entitled to forfeit the deposit without prejudice to other remedies. Time was to be of the essence of the said agreement.

In the event, the plaintiff did not complete as provided by the said agreement, or at all. Extensions of time were requested and given but for a price. The plaintiff was required to pay interest on the remainder of the purchase price and this interest eventually aggregated to a sum of $680,090.35. The plaintiff was also required to pay a further $500,000 towards account of the purchase price. In return for these payments, time for completion was extended in five stages from September 16, 1984 to September 30, 1985.

The terms of the last extension are set out in a letter dated August 29, 1985 which is reproduced here in full:

'Canadian High Commission
P.O. Box 10990
Kuala Lumpur
August 29, 1985.

Dear Mr. Lai,

Re: Sale of Lot 270, Section 63, Town of Kuala Lumpur (No. 9, Jalan Stonor, Kuala Lumpur)

This is to confirm the telephone conversation on August 20 between yourself and the undersigned during which you were informed of the Canadian Government's decision to provide the purchaser with a *final* extension until September 30, 1985 of the sale and purchase agreement for the property under reference. The extension, however, has been granted, conditional upon the purchaser meeting the following terms:

(a) That in the event the purchaser does not consummate the sale and purchase agreement by the due date of September 30, 1985, he will forfeit all monies paid to date, that is to say:

(i)	1st 5% of purchase price –	$286,870.50
(ii)	2nd 5% of purchase price –	$286,870.50
(iii)	8.71% of purchase price –	$500,000.00
(iv)	Interest for extensions at 15% per annum for periods:	
	September 16, 1984 to January 15, 1985 –	$285,183.45
	January 16, 1985 to January 31, 1985 –	$33,953.89
	February 1, 1985 to February 28, 1985 –	$59,417.56
	March 1, 1985 to June 30, 1985 –	$258,183.45
	Total:	$1,683,478.35

(b) That the purchaser also forfeits any interest monies accrued from the deposit of the aforementioned funds.

(c) That only the following sums of monies paid will be applied against the purchase price of $5,737,410.00 if and when the purchaser consummates the sale and purchase agreement:

(i)	1st 5% of purchase price –	$286,870.50
(ii)	2nd 5% of purchase price –	$286,870.50
(iii)	8.71% of purchase price –	$500,000.00
		$1,073,741.00

and that the purchaser will remit the balance owing of $4,663,669.00 on or before September 30, 1985.

(d) That in the event the purchaser consummates the sale and purchase agreement by the extension date of September 30, 1985, the continued tenancy terms previously agreed upon will remain as follows.

The purchaser agrees to a tenancy to the Canadian High Commission of the reference property for a period of 24 months from the date of completion on a rent-free basis. In the event the purchaser requires possession of the premises at any time during this 24-month period, he is required to give the Canadian High Commission six months' prior notice of his intention to take possession of the premises. The Canadian High Commission will give possession of the premises at the end of the notification term. If there is any unexpired period of the aforesaid 24 months, the purchaser agrees to be responsible for payment of the rental of alternative suitable accommodation for the Canadian High Commission (subject to its approval) of a sum not exceeding $8,000 per month. If the High Commission moves to alternative suitable premises before the expiry of the six-month notice period mentioned above, the purchaser will still be responsible for payment of rental of the alternative suitable accommodation from the commencement of the tenancy for this accommodation.

It would be appreciated if the purchaser could be informed of the decision to grant the extension of the completion date for the sale and purchase agreement and the terms which pertains to this extension.

Yours sincerely,

Sgd.
A.O. Dugas
Second Secretary.

Jones Lang Wootton
No. 4, Jalan Ampang
Kuala Lumpur 01-06.

Attention: Mr. Sunny Lai

c.c. Mr. Yap Eng Bok
Jones Lang Wootton

c.c. Mr. Wong Som Nuck
Wong Som Nuck and Co.
Advocates and Solicitors
Room 404 (4th Floor)
Bangunan N.U.B.E.
No. 114, Jalan Tunku Abdul Rahman
Kuala Lumpur."

On September 28, 1985, prior to the expiry for the final extension aforesaid, the plaintiff sought a yet further extension of time to complete. The defendant declined. By a letter dated October 4, 1985 the defendant's solicitors notified the plaintiff's solicitors that the said agreement had been terminated on September 30, 1985 due to the plaintiff's failure to complete the purchase, and that all sums paid by the plaintiff under the said agreement stood forfeited to the defendant. This amounted to $1,752,835.35.

Clause 10 of the said agreement reads as follows:

"10. If for any reason (default by non-compliance by the purchaser excepted) the vendor fails to complete the sale or transfer of the said property, the purchaser shall be entitled to sue for specific performance thereof and damages. Notwithstanding the fact that the said property is located outside Canada and by virtue of the vendor not being subjected to the Malaysian courts, it is agreed that this agreement shall be construed in accordance with the rights and liabilities of the parties hereto according to laws for the time being in force in Canada."

Clause 18 of the said agreement provided as follows:

"18. Any notice required to be given under this agreement shall be in writing and shall be sufficiently served on the parties by registered letter addressed to it at its registered office in Malaysia and shall be sufficiently served on them by such registered letter addressed to them at their respective addresses stated herein and shall be deemed to have been received by the addressee in the ordinary course of such posting."

The plaintiff then engaged Messrs. Ng Ek Teong & Partners who issued a writ out of this court on September 9, 1986. Her Majesty the Queen in Right of Canada was named as the defendant and the writ was addressed to Her Majesty c/o the Canadian High Commission, 5th Floor, Wisma American International Assurance, Jalan Ampang, Kuala Lumpur. In the statement of claim, the plaintiff set out the facts and proceeded to plead that even though time was mentioned to be of the essence of the said agreement pursuant to clause 17 thereof, nevertheless that stipulation had been waived by virtue of the non-payment of the full sums of the deposit at the time of the execution of the said agreement, the five extensions of time granted for completion of the agreement, and the conduct of the parties. Consequently, it was contended that the notice of termination of the said agreement by the defendant given on October 4, 1985 was in fact a wrongful repudiation of the said agreement. It was further contended that the forfeiture of the total amount paid by the defendant under the said agreement was also improper. According to the plaintiff, this was so, because it was incumbent upon the defendant in the circumstance to grant the plaintiff reasonable time for completion. In the alternative it was submitted that the forfeiture of the entire amount paid was excessive and unconscionable and in the nature of a penalty. So the plaintiff claimed for a refund of the total amount paid with interest thereon and damages. In the event that this court were to find that the termination of the said agreement was proper the plaintiff claimed that the defendant should be allowed to retain only 5% of the purchase price but by way of liquidated damages and that the balance of the total amount paid should be refunded to the plaintiff with interest thereon.

On October 9, 1986, Messrs. Ng Ek Teong & Partners wrote a letter to the senior assistant registrar of this court requesting him to arrange for the court process server to effect service of the writ on the defendant. In the event that service was effected, they requested for a copy of the affidavit of service of the court process server. They undertook to pay all the charges incurred. What they did not do was to draw the attention of the senior assistant registrar to the law on the matter. I will do so shortly.

Acting on this letter, the court process server first called upon the premises of the Canadian High Commission on October 23, 1986. He was met by Mr. Dugas, the First Secretary of the High Commission. Mr. Dugas refused to accept service and when the process server attempted to leave a copy of the writ there, Mr. Dugas indicated that he would call for the police to eject the process server if the process server persisted in forcing himself and his papers upon the High Commission. After being informed of the identity of the defendant's solicitors, the process server left. On October 29, 1986 the court process server swears that he was specifically directed by his officer to serve the writ and upon the refusal of the defendant's solicitors to accept the same he called at the premises of the High Commission and left the writ with a Malay female member of the staff of the High Commission. The High Commission protested immediately. They wrote to Messrs. Ng Ek Teong & Partners and a copy to the registrar in the following terms:

"COPY

29th October 1986.

Messrs. Ng Ek Teong and Partners
Advocates and Solicitors
2nd Floor
Bangunan Persatuan Hokkien Selangor
Jalan Raja Chulan
Kuala Lumpur

Dear Sir,

Re: Purported Court Document
Suit No. C23-2838-86

We wish to place on record that at about 3 p.m. on October 29, 1986 a male Indian encroached onto our Chancery premises and without word forcibly inserted through our receptionist's enclosure a set of documents which upon our inspection were found to be a writ of summons purportedly issued by the High Court (Commercial Division), Kuala Lumpur. Having done so, the said male Indian then immediately made his exit in quick time, refusing to take back the said document.

Our conclusion is that this incident was another attempt on your part to serve court process on us. You ought to be aware that the Chancery forms part of Canadian territory and that the male Indian was a trespasser thereon by virtue of the reason for his entry.

We do not accept your document and return the same herewith.

Yours sincerely,

Sgd.
D.K. Hallman
Counsellor

cc. Registrar
(Commercial Division)
High Court
Kuala Lumpur."

This is a convenient point to set out the provisions of section 6 of the Diplomatic and Consular Privileges Ordinance 1957. It reads:

"6. Subject to the provisions of this section, a consular office of a country to which this part applies shall not be entered by a police officer or other person acting in the execution of a warrant or other legal process or in exercise of the powers conferred by or under any written law (whether passed before or after the commencement of this Ordinance) or otherwise except with the consent of the consular officer in-charge of the office or if that consent is withheld or cannot be obtained with the consent of the minister: ..."

(The proviso to this section is not relevant to the present exercise.)

The words of section 6 above set out are quite clear. In the course of the arguments before me, it was submitted that clause 18 of the said agreement could afford some justification for what was done in this case. It is the opinion of this court that clause 18 does nothing of the kind. The service of a notice required to be given under the agreement, and the service of court process is not the same thing.

The defendant also attacked the service of the writ for non-compliance with Order 6 rule 6 and Order 11 of the Rules of the High Court. These rules provide that the leave of the court is required before a writ can be served out of the jurisdiction. Plaintiff's counsel suggested that the premises of the Canadian High Commission is Canadian territory and therefore outside the jurisdiction. Mr. Thillaimuthu conceded that leave was required and that proper service had not been effected.

The issue was therefore not fully argued. For myself, I do not consider that the leaving of a writ with some unidentified member of an embassy staff is proper service (even if we are to assume that the person concerned was so employed) and that the entry into the premises was lawful. Nor have I been satisfied that the premises of the Canadian High Commission is outside the jurisdiction of this court. The expression "jurisdiction" here, to my mind, must mean the area of the territorial jurisdiction of the High Court. It covers the whole of Peninsular Malaysia. Section 2 of the Courts of Judicature Act 1964 refers. So Order 6 rule 6 and Order 11 of the Rules of the High Court cannot help us here.

In other cases, attempts have been made to get round this obstacle by applying for substituted service. But the law is that substituted service can only be had in cases in which personal service could be had. As the courts have no jurisdiction over a foreign sovereign, the rule is that he cannot be served by substitution (*Mighell* v. *Sultan of Johore*[1]). See also in the case of a colonial government (*Sloman* v. *Government of New Zealand*[2]). Where there is sovereign immunity, service can only be effected if the sovereign ruler or government submits to the jurisdiction of this court.

In the present case there never was any submission. The purported service was not only factually ineffective but also in violation of a statute. On that ground alone I am compelled to hold that there was no proper service as required by law or at all.

The dilemma facing solicitors as to how to effect proper service when there is a refusal to submit and existence of actual immunity is contested must for the time being remain unresolved, at least until this issue is more fully argued elsewhere. In the meantime, everyone concerned would do well to take careful note of the comments in *A Diplomat's Handbook of International Law and Practice* by B. Sen, 1979 Ed. at p. 94.

On November 5, 1986 the defendant entered conditional appearance and applied to set aside not only the service of the writ but the writ itself. At the commencement of the hearing of the application, counsel for the defendant tendered a certificate under the hand of the Secretary-General, Ministry of Foreign Affairs, Malaysia. It is dated May 19, 1987 and reads:

"This is to certify that Her Majesty the Queen In Right of Canada is a foreign sovereign recognized by His Majesty the Yang di-Pertuan Agong Malaysia."

Mr. Thillaimuthu, counsel for the plaintiff, conceded that this certificate showed that the defendant is a foreign sovereign, that this court should take judicial notice of the certificate and that consequently this certificate is sufficient proof that the defendant is a foreign sovereign. But he nevertheless maintained that he could carry on with this action. In other words, it was being contended for the plaintiff that even though the defendant was a foreign sovereign, there was no actual immunity to this action.

For the record, I would state here that in his affidavit in support of the application to set aside, Mr. Dugas, the First Secretary of the Canadian High Commission, affirmed on oath that section 9 of Canada's Constitution Act 1867 provides: "The executive government and authority of and over Canada is hereby declared to continue and be vested in the Queen." He also said that in entering the said agreement the defendant was acting in her official capacity for the Government of Canada through her representative at the High Commission. He claimed that the defendant is a sovereign and immune from legal process in Malaysia and referred to clause 10 of the said agreement. He asserted that at no time was there ever any waiver of immunity or submission to the jurisdiction of this court. He said that Her Majesty held the said lands in her official capacity on behalf of the Government of Canada and that the property was being used for staff quarters to house Canadian Government representatives, including her diplomatic members in Kuala Lumpur. He also averred that in entering into the said agreement, Her Majesty was involved in a governmental transaction as opposed to an ordinary trading transaction.

This brings me to the major issue in this case because Mr. Thillaimuthu, counsel for the plaintiff, contends that there is no actual immunity in this case and that consequently, even though the service of the writ was bad, the writ itself is good. His arguments ran as follows. First, he submitted that the proper interpretation of clause 10 of the said agreement is that the defendant contractually agreed with the plaintiff to submit to the jurisdiction of the Malaysian courts but subject only to the laws of Canada being applied. Secondly, he contended that sovereign immunity cannot be claimed for private acts. This, he said, was a commercial transaction. So the court should apply the reasoning in *Trendtex Trading Corporation Limited* v. *Central Bank of Nigeria*.[3] Thirdly, he submitted that because the Malaysian Act of Parliament No. 24 of 1966, the Diplomatic privileges (Vienna Convention) Act 1966, was identical to the English Diplomatic Privileges Act 1964, *Intpro Properties (UK) Limited* v. *Sauvel and Others*[4] applied.

That was a case where an English landlord sought to enter into residential premises owned by him and let out to the French Government. The house was used as a residence of a diplomatic agent who obstructed the landlord and successfully prevented him from entering the premises to effect urgent repairs. So the landlord issued a writ against the diplomat in question, seeking an injunction to restrain him from preventing access to the premises or interfering with the repair work and damages. The diplomat applied to set aside the writ on the ground that as a member of the diplomatic staff of the French mission he was a diplomatic agent within article 1(e) of the Vienna Convention on Diplomatic Relations as set out in Schedule 1 to the Diplomatic Privileges Act 1964 and accordingly enjoy diplomatic immunity. There is another statute in the United Kingdom intituled the State Immunity Act 1978. (There is no equivalent Malaysian statute.) By virtue of section 6(1) of this Act, a foreign state was not immune from proceedings relating to "any interest of the state in, or its possession or use of, immovable property in the United Kingdom." But by section 16(1)(b) of the 1978 Act, the exception from immunity under section 6(1) did not extend to proceedings concerning a state's title to or its possession of property used for the purposes of a diplomatic mission. In the first instance, the

trial judge held that the immunity applied. The plaintiffs appealed. Before the appeal was heard, the diplomat vacated the permises. The appeal was allowed because it was held that under the 1978 Act the immunity only applied to premises used for the diplomatic mission as such and did not extend to premises used as a private residence by a diplomatic agent. Thus, only the residence of the head of mission was protected but not residences of other members of the mission which therefore could not form part of the premises of the mission itself. The court also held that the immunity of foreign states and diplomatic agents to proceedings in the English courts was a matter of procedure and not of substance and, accordingly, where that immunity applied it did not erase the cause of action but merely prevented an action being maintained on it.

Plaintiff's counsel placed very heavy reliance upon this case and was at pains to emphasize the similarity between the facts of that case and the present. He stressed that Village Holdings Sdn. Bhd., the plaintiff in this case, was not asking for possession or specific performance but was merely claiming for money. He conceded that the claim for specific performance was not possible because specific performance could only be compelled by contempt proceedings. But he asserted that in the circumstances of this case, there was no immunity against a money claim.

Mr. Patrick Koo, counsel for the defendant, argued as follows. Section 3 of the Civil Law Act 1956 applied the common law of England as administered in England on April 7, 1956. By Article 160(2) of the Federal Constitution, " 'law' includes ... the common law in so far as it is in operation in the Federation ..." and a similar definition occurs in the Interpretation and General Clauses Ordinance 1948 and in the Interpretation Act 1967, Part 2, section 3. He then referred to the dictionary definition of common law in Butterworths *Words & Phrases Legally Defined* (2nd Ed.) (1969) at p. 286 and *Osborne's Law Dictionary* at p. 82 where "common law" is stated to be "the common sense of the community, crystallized and formulated by our forefathers". Mr. Koo then referred to *I Congreso*[5] at p. 257 where Lord Wilberforce said:

"My Lords, these two appeals raise questions of importance as to the scope of the 'restrictive' theory of state immunity as it existed in the law of this country in 1973-75 when the relevant events happened. The law in question is the common law before this was superseded by statute (the State Immunity Act 1978); it will continue to form part of the corpus of international law."

Then at p. 261, Lord Wilberforce said:

"I can now try to state the English law: this can be done without complication up to a certain point. Until 1975 it would have been true to say that England, almost alone of influential trading nations (the United States of America having changed its position under the Tate letter in 1952), continued to adhere to a pure, absolute doctrine of state immunity in all cases."

Mr. Koo then referred to *Mighell* v. *Sultan of Johore*[1] and *Duff Development Company Limited* v. *Kelantan Government & Another.*[6] The facts and the law as stated in these decisions are too well-known to need repetition here. The common law of England as administered in England on April 7, 1956 was that the immunity from legal process accorded to a foreign sovereign was absolute. Both in *Mighell's* case[1] and in *Duff Development Company Ltd.*,[6] the court also held that the time when a foreign sovereign must decide whether he submits or not must be when the court is about to exercise authority over him. He elects whether he will submit or not when the court cites him to appear and if at that time he proves that he is an independent sovereign, then the court has no jurisdiction over him. In so far as clause 10 of the said agreement was concerned, Mr. Koo submitted that it was clear from the material before the court that non-completion had occurred by reason of the default not of the vendor, but of the purchaser. Consequently, it could not by any stretch of the imagination be contended that Her Majesty had made herself amenable to process by virtue of this clause.

He further submitted that the proper inference to be drawn from the words "and by virtue of the vendor not being subject to the Malaysian courts" was that there was no submission to the Malaysian jurisdiction and even if non-completion had occurred by reason of the vendor's default, the purchaser would have had to sue for specific performance and damages not in Malaysia but in Canada. In the alternative, he submitted that even if clause 10 could be said to be a contractual submission to the jurisdiction of the Malaysian courts, that was not binding upon the defendant who could elect not to submit when given notice of this action. The rest of his submission went to an explanation of the restrictive theory of immunity and its non-application to Malaysia.

To turn now to the issues raised, let me say straightaway that I am unable to see anything in clause 10 of the said agreement to suggest that the defendant had thereby agreed to submit to the jurisdiction of the Malaysian courts. In order to

rely on the clause, the plaintiff has first of all to show that the vendor had failed to complete. That the plaintiff cannot do. Even if it could, the proper interpretation appears to me to be only that Canadian law would apply. It is not necessary for me to decide whether the clause made it incumbent in that event for the plaintiff to sue in Canada. That is not the question which arises for determination here even though that is the result which must follow because by virtue of the reasoning in *Mighell's* case[1] and the *Duff Development Company* case[6] I am persuaded to hold that even if there was some prior contractual agreement to submit, such agreement is not permanently binding and the sovereign can subsequently refuse to be impleaded. So clause 10 of the said agreement does not assist the plaintiff at all.

Next I hold that the Diplomatic Privileges (Vienna Convention) Act 1966 ("the 1966 Act") has not diluted the immunity claimed by the defendant in the manner claimed by plaintiff's counsel or at all. To my mind, there is an important distinction to be drawn between the immunity accorded to a sovereign, and that accorded to a sovereign's diplomats. Under Part II of the Diplomatic and Consular Privileges Ordinance No. 53 of 1957 ("the 1957 Ordinance"), section 3 conferred total immunity from suit and legal process to the chief representative (in this case the Canadian High Commissioner) and the members of his official staff. The 1966 Act repealed Part II of the 1957 Ordinance. In its place section 2 of the 1966 Act brought the Vienna Convention into operation in Malaysia by re-enacting it in the Schedule thereto.

Article 31 of the Schedule reads:

"A diplomatic agent shall enjoy immunity ... from civil and administrative jurisdiction except in the case of:

(a) a real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purposes of the mission."

With respect to Mr. Thillaimuthu, it is the opinion of this court that this Article does not assist the plaintiff for two reasons. First the exception only applies to *private* immovable property. I hold this to mean that the property must be owned by some individual or corporation. Here, the property was owned by Her Majesty the Queen herself. Part V of the 1957 Ordinance is still good law and section 9 thereof expressly authorizes the ownership by a foreign sovereign of land in Malaysia for the purposes of the residence or offices of the chief representative of such country or his official staff. It is therefore not "private" property in the sense intended in Article 31.

This feature, with respect to all concerned, makes the case of *Intpro Properties (UK) Limited* v. *Sauvel & Others*[4] clearly distinguishable. There, the house was owned by an English private company. The French Government was merely a tenant, and Mr. & Mrs. Sauvel, the occupants, were mere licensees.

Again with respect, I hold that in the case before me, by virtue of section 9 of the 1957 Ordinance, where land in Malaysia is granted, alienated, leased or transferred to or owned or held by the sovereign or government of any country, even if only as a residence of its official staff, it must be held that such land is held for the purposes of the mission.

The second reason why Article 31 does not assist the plaintiff is that we are not concerned here with the immunity of a diplomat but with the sovereign herself. The *Intpro* case[4] went the way it did on appeal because the sovereign immunity of the French Government was diluted by section 16(1)(b) of the English State Immunity Act 1978. Plaintiff's counsel concedes we have no equivalent statute here.

So we come to the last string in the plaintiff's bow, which is the plea that this court should apply the doctrine of restrictive immunity because it is alleged that this was a commercial transaction.

In *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria*[3] Lord Denning M.R. said (at p. 888):

"The doctrine of sovereign immunity is based on international law. It is one of the rules of international law that a sovereign state should not be impleaded in the courts of another sovereign state against its will. Like all rules of international law, this rule is said to arise out of the consensus of the civilized nations of the world. All nations agree upon it. So it is part of the law of nations.

To my mind this notion of a consensus is a fiction. The nations are not in the least agreed upon the doctrine of sovereign immunity. The courts of every country differ in their application of it. Some grant absolute immunity. Others grant limited immunity, with each defining the limits differently. There is no consensus whatever. Yet this does not mean that there is no rule of international law upon the subject. It only means that we differ as to what that rule is. Each country delimits for itself the bounds of

sovereign immunity. Each creates for itself the exceptions from it . It is, I think, for the courts of this country to define the rule as best they can, seeking guidance from the decisions of the courts of other countries, from the jurists who have studied the problem, from treaties and conventions and, above all, defining the rule in terms which are consonant with justice rather than adverse to it."

The foundation of the doctrine of sovereign immunity in international law is reciprocity and mutual recognition. As Brett L.J. said in *The Parlement Belge*[7] at p. 214:

"The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state each and every one declines to exercise by means of its courts any of its territorial jurisdiction over person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of its territory, and therefore, but for the common agreement, subject to its jurisdiction."

In his affidavit in support of the application to set aside, Mr. Dugas avers that in entering into the said agreement Her Majesty "was involved in a governmental transaction as opposed to an ordinary transaction".

Ms. Chuah Ah Bee, the secretary of the plaintiff company, has filed an affidavit in response to say that the transaction "is a purely commercial transaction in that it is well known to both parties that the plaintiff intended to purchase the property for development purpose ...".

In Malaysia we have enshrined the paramount position of our rulers in the matter of sovereignty in the second principle of the Rukun Negara and the last bar of our national anthem. This court should take this occasion to reaffirm that we regard the sovereignty and legal immunity of our rulers in their personal capacity as non-justiciable.

As to how the limits of the doctrine of sovereign immunity should be defined, it is not irrelevant to state that within Malaysia, Articles 32(1) and 181(2) of the Constitution (which provides for the legal immunity of the Yang di-Pertuan Agong and the rulers of the states respectively) have received judicial attention in *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg & Tawi Sli (No. 2)*[8] and *Haji Ariffin* v. *Government of Pahang.*[9] (See also *An Introduction to the Constitution of Malaysia* by Tun Mohamed Suffian bin Hashim (2nd Ed.) paragraphs 24 and 39.)

The plaintiff's case is that the act complained of is a private act. A Malaysian sovereign, for reasons already stated, cannot be sued in Malaysia for a private act.

So far as a foreign sovereign is concerned, I hold that section 3 of our Civil Law Act 1956 leaves no room for any doubt that we in Malaysia continue to adhere to a pure absolute doctrine of state immunity when it comes to the question of impleading a foreign sovereign who declines to submit.

The plaintiff did not seek to admit any evidence as to what Canadian law was on the matter. I was therefore left to infer that in contending that the defendant was subject to the jurisdiction of this court he was advancing a proposition that if a transaction was "purely commercial" there was no immunity under Malaysian law. In the light of what I have just said in the previous paragraph, it matters not in Malaysia whether the transaction was so. Suffice it to say as regards *Trendtex*[3] and the line of subsequent English cases which have been cited to me that I think there is a qualitative difference between trading in the open market with a view to profit, and a one-off transaction where a sovereign mission is disposing mission property which it holds in another jurisdiction. If Mr. Dugas was right and this was a governmental transaction, then even if the restrictive theory of immunity applied the defendant would have been immune anyway.

In all the circumstances, I feel constrained to say that since the plaintiff knew that the defendant would refuse to submit to the jurisdiction if it was sued, this suit was an act of *lese-majeste* and clearly misconceived. The manner in which the plaintiff's solicitors went about trying to get it served was an abuse of the process of this court and an affront to the defendant. In setting aside both the writ and the service thereof, it is a matter of regret that I felt unable to make an order for the payment of costs.

Writ and service thereof set aside.

Solicitors: *Wong Som Nuck & Co.; Jayaraman & Ong.*